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SUBJECT: KENYA CONSTITUTION: MINIMUM REFORMS, MAXIMUM DEBATE

Classified By: Political Counselor Larry Andre for
reasons 1.4 (b,d).

¶1. (SBU) SUMMARY: A step back from complete overhaul, the current constitutional review debate in Kenya centers on a slate of "minimum reforms." Supporters of the proposed changes, many of which concern the electoral process, argue that these initial reforms must be made before the next general election expected in December. Initially lukewarm to the idea of piecemeal adjustments as a cheap substitute for a new constitution, the government now supports certain reforms, depriving the opposition of a key election issue. END SUMMARY.

¶2. (SBU) Constitutional reform is a long-simmering debate in Kenya. Despite the Kibaki administration's election promise in 2002 to deliver a new constitution in its first 100 days in office, the closest the country actually came to realizing the pledge was November 2005's referendum, nearly 3 years overdue. That draft, considered by its opponents an illegitimate government project, was defeated. Debate on constitutional reform subsided, until election season approached. The opposition started first, calling for minimum reforms without which it would boycott this year's general election (mere "posturing" one civil society observer called it). More recently, the government too has agreed on the need for change. The agreement, however, ends there. The two sides disagree on the precise nature of the reforms, in particular those concerning the electoral process.

Electoral Reforms -----

¶3. (U) Among the reforms currently debated, a number will effect the electoral process. They are: movement of the political parties registration function to the Electoral Commission from the Registrar of Societies; the Electoral Commission's financial independence from the Ministry of Justice; an increase in the number of nominated MPs from 12 to 36, of which at least 24 should be women; Parliamentary authority to determine its own calendar; government funding for political parties; a provision that a member of an opposition party can only join the government with the approval of his/her party (a prohibition on "poaching"); and perhaps most controversially, that the winner of a presidential election should gather more than 50 percent of the votes nationwide, in addition to the currently required 25 percent in five of the eight provinces; the so-called "50 plus one" provision.

¶4. (C) When first proposed, the government rejected the reform agenda as an attempt to change the rules of the election game while the match is in progress. Justice and Constitutional Affairs Minister Martha Karua defended the Kibaki administration's record on constitutional reform, arguing that the opportunity had passed; the government tried to give Kenya a new constitution (in November 2005), but Kenyans rejected it. More receptive to minimum reforms than some of his colleagues in government, Trade Minister Mukhisa Kituyi, who was at the time (pro-government) NARC-Kenya interim Chairman, told poloffs that he was in favor of any reforms that relate to the transparent, professional conduct of the election. However, Kituyi was dismissive of the opposition's call for reforms as simply their way of tinkering with government to create offices (Prime Minister) which will facilitate (opposition) ODM-K's internal deal-making. While it is the opposition that has been most vocal in demanding reforms before the election, many of the suggested changes appear in a December 2006 report compiled by Parliament's multi-party committee on Justice and Legal Affairs.

Kibaki Takes the Bait

¶5. (C) Although in his March 20 speech opening Parliament, Kibaki only offered the bland promise to "facilitate dialogue on the nature and extent of the reforms that are needed," within a week, his government took more concerted steps to address the issue. Vice President Moody Awori informed the Ambassador on March 26 that earlier the same day the government had a "constitutional breakthrough:" they must accept the people's demand for minimum reforms. As such, Awori explained, three bills which contain elements of reform, the Constitution of Kenya Amendments Bill, the Constitution of Kenya Review Bill, and the Political Parties Bill will be prioritized on the House's agenda. The bills will have to pass early enough for some of the provisions, such as government funding for political parties, to be included in this year's budget. In addition, the government will form a committee of both pro-government and opposition MPs, chaired by Karua, to develop a "roadmap" for reform. The bills have since been published (the precursor to a bill's tabling in Parliament), and the government named its members of the committee, which includes the Chair of the Justice and Legal Affairs Committee, Paul Muite.

¶6. (C) The opposition reacted critically to the government's sudden about-face on minimum reforms. When the committee Awori promised was announced on March 27, a publicity message from Raila Odinga blasted the composition as unbalanced: 12 government and 10 opposition. Odinga also stated that the "50 plus one" demand is "non-negotiable and non-debatable." This is despite what ODM leaders are saying privately that they realize "50 plus one" is impossible, and they would rather use that as a bargaining chip. Their priority is the prohibition on poaching. (COMMENT: "50 plus one" is widely considered an unrealistic demand. A united opposition could defeat Kibaki, a chance the government is not willing to take. Under the current system, Kibaki can win a plurality with his ethnic support base which comprises more than 30 percent of Kenya's population. END COMMENT.)

Are They For Real?

¶7. (C) The government's change of heart notwithstanding, observers are not holding out for meaningful reform before the election. The International Commission of Jurists' Monica Mbaru thought the government and opposition might work out a "gentleman's agreement" which is not legally binding but does show an attempt at reform. For example, they may resolve that parliament can take over setting its own calendar from the executive. Mbaru remarked that the debate is confined to the political class, with the general public fatigued of the issue. Civil society is also "hands off" compared to its partisan involvement before and during the

2005 referendum, she added. Poll results support Mbaru's observation. A year after the 2005 referendum only 2.6 percent of respondents indicated that constitutional review was the most important issue the government should address. Even Muite was not inspired by the government's overtures. During a breakfast meeting with the Ambassador, Muite applied to the reform process a common criticism of Kibaki: the President is for it, but he is "overruled by his ministers."

Comment: The Government Pulls a Fast One

18. (C) The government has undermined a key aspect of ODM-K's election strategy. Demanding reforms was a way for the opposition to call the Kibaki administration to task for failing on one of its 2002 election promises, and gave the half-dozen strong personalities vying for the ODM-K nod for president something to focus on besides each other. With the government now appearing to be in front on the constitutional review issue, and in the driver's seat with regard to actually delivering, they stand to come out of the process looking good. All the government has to do to successfully steal this issue from the opposition is look like it delivered on something, even if it really is the bare minimum. END COMMENT.
RANNEBERGER